PUBLIC PROSECUTOR

v.

RAVINDRA N. RETHINAM & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VISU SINNADURAI J
[FEDERAL TERRITORY CRIMINAL TRIAL NO. 45-7-91]
10 SEPTEMBER 1992

CRIMINAL PROCEDURE: *Sentencing - Originally six accused charged for murder under s. 302 to be read with s. 34 of the Penal Code - Not guilty plea - Prosecution amended charge to culpable homicide not amounting to murder - Section 304 (1st limb) to be read with s. 34 of the Code - Pleaded guilty to reduced charge - Plea in mitigation - Sentencing practice/principles - Discretion of Court to determine appropriate sentence - Discount or credit for plea of guilty not on the maximum sentence - What would have been appropriate sentence if accused had not pleaded guilty but found guilty and convicted.*

On 8 September 1992, 6 accused persons were charged for an offence of culpable homicide not amounting to murder (1st limb) under s. 304 to be read with s. 34 of the Penal Code at the High Court, Kuala Lumpur. The question arose as to what was the appropriate sentence to be imposed on the accused persons who had pleaded guilty.

Held:

[1] It is an accepted rule of practice that an accused person be given credit or discount for pleading guilty and this general rule was applied by the Supreme Court in *Mohamed Abdullah Ang Swee Kang v. PP* [1987] CLJ (Rep) 209. However, this rule, is not a strict rule as the Courts may, in exercise of their discretion, in exceptional cases, refuse to grant any discount (*PP v. Leo Say & 2 Ors.* [1985] CLJ (Rep) 683).

[2] In applying the above principles of sentencing, the accused persons in the present case would be entitled to a discount or credit from a sentence which they would have obtained had they not pleaded guilty and had been convicted.

[3] Having considered all the relevant factors, the Court sentenced the first, third, fourth, fifth and the sixth accused to a term of imprisonment for 8 years to run from their date of arrest. As for the second accused, taking into consideration that he has committed other offences before, one in 1983 and the other in 1986, the Court sentenced him to a term of imprisonment for 8½ years to run from the date of his arrest.

[First, third, fourth, fifth and sixth accused sentenced to 8 years to run from their date of arrest. Second accused sentenced to 8½ years to run from date of his arrest.]

Cases referred to:

Lee Weng Tuck & Anor. v. PP [1989] 1 CLJ (Rep) 75 ***(foll)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(cons)***
R. v. Kenneth John Ball [1951] 35 Cr App R 164 ***(cons)***
PP v. Teh Ah Cheng [1976] 2 MLJ 186 ***(cons)***
Jayatilake v. PP [1982] 1 MLJ 83
McLoughlin and Simpson [1979] 1 Cr App R (S) 298 ***(refd)***
R. v. de Haan [1967] 3 All ER 618 ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1987] CLJ (Rep) 209 ***(refd)***
R. v. Boyd [1980] 2 Cr App R (S) 234 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134 ***(refd)***
Tham Kai Yan & Ors. v. PP [1977] 1 MLJ 174 ***(cons)***

PP v. Leo Say & 2 Ors. [1985] CLJ (Rep) 683 ***(refd)***
PP v. Chot Saik Kam [1991] 1 MLJ 193 ***(foll)***
PP v. Tay Chuan Beng [1989] 1 MLJ 403 ***(foll)***

Legislation referred to:
Criminal Procedure Code, s. 294
Penal Code, ss. 34, 302, 304 (first limb)

Other sources referred to:
Judicial Independence and Sentencing Reform in The Future of Sentencing, Ashworth, [1982] Cambridge University Institute of Criminology
Sentencing, Stockdale & Delvin, The Criminal Law Library No. 5, 1987, para. 2.23
11 Halsbury's Laws of England, 4th Edn., para. 483
Criminal Sentences: Law Without Order, Judge Frankel [1973]
The Court and the Offender, Stockdale [1967], p. 202

For the prosecution - Kamarulzaman bin Abd. Jalil Mohd. Jamil bin Hussin, DPCs (AG's Chambers)
For the 1st accused - Mahadevi Nadchatiram; M/s.Mahadevi Nadchatiram & Partners
For the 2nd accused - M.G. Seelan; M/s. Seelan & Santha
For the 3rd accused - N. Rajendran (Raja Devan & Paul Kwong with him); M/s. Azman Davidson & Co.
For the 4th accused - G. Pararajasegran; M/s. P.G. Segran Associates
For the 5th accused - Bhagwan Singh; M/s. Bhagwan Singh
For the 6th accused - K. Nadarajah; M/s. K. Nadarajah & Partners

JUDGMENT

Visu Sinnadurai J:

The Facts

On the first day of the trial, 7 September 1992, the prosecution tendered a charge against the six accused which was for murder punishable under s. 302 of the Penal Code read together with s. 34.

All accused pleaded not guilty and claimed trial.

In accordance with the procedure under the Criminal Procedure Code, a jury of seven was chosen. The Deputy Public Prosecutor after having presented a statement of facts, made a request to the Court that the trial be adjourned so as to enable the prosecution to consider the possibility of the charge being amended. As there was no objection from any of the Counsel acting for the accused persons, this Court granted an adjournment until Wednesday, 8 September 1992.

When the Court sat on 8 September 1992, the learned Deputy Public Prosecutor informed the Court that the prosecution was tendering an amended charge against the six accused. The original charge of murder was then reduced to one of culpable homicide not amounting to murder, punishable under the first limb of s. 304 of the Penal Code read together with s. 34 of the said Code. The charge read as follows:

> Bahawa kamu bersama-sama 2 orang yang masih bebas pada 9 Julai 1988 jam lebih kurang antara 5.30 petang dan 12.00 tengah malam di sebuah padang di Batu Estate Segambut, di dalam Daerah Sentul, di dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan dengan niat yang sama telah menyebabkan kematian penama Ramadas a/l Veliasamy (KP: 2492554) dengan niat menyebabkan kecederaan badan yang berkemungkinan besar mendatangkan kematian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 304 (Bahagian Pertama) Kanun Keseksaan dibaca bersama dengan s. 34 Kanun yang sama.

The charge was then read and explained to each of the accused persons. All of the accused persons elected to plead guilty on the reduced charge.

The Deputy Public Prosecutor then read out the statement of facts pertaining to the new and reduced charged. The facts as presented by the Deputy Public Prosecutor were as follows: The six accused and two others still at large had the common intention to cause injuries to the deceased with the intention of causing death. On 9 July 1988 at about 5.30 p.m at Batu 5½ Jalan Kelang Banting, Selangor, the six accused persons were seen with two others still at large. At that place and time there were two cars, a Datsun, bearing Registration Number BAQ 1566 and a Proton Saga, bearing Registration Number BCH 6717 and another car belonging to the deceased, a Toyota, bearing Registration Number BBT 8561.

The deceased was also seen at the same place. The deceased was stabbed and punched, and he was forcibly dumped into the Proton Saga. The six accused, and the two still at large, drove the Proton Saga and the Datsun and headed towards the direction of Kuala Lumpur.

On the way to Kuala Lumpur, the deceased, whilst in the Proton Saga, was further stabbed and punched. The deceased was then dumped in a padang at Batu Estate, Segambut. At this place, the deceased was further slashed and subsequently the body of the deceased was taken and thrown into a stream at Segambut Atas, Sentul.

The body of the deceased was taken for *post mortem.* The death was certified to have been caused by the slashed and stabbed wounds. Investigations carried out by the police indicated that the six accused, and the two others still at large, had a common intention to cause the injuries to the deceased as was likely to cause his death. Police investigation also revealed a long parang and a knife were used for this purpose.

After the Deputy Public Prosecutor had read out the facts, the Court then asked each and everyone of the accused whether they understood the facts and whether they agreed to it. They were again asked whether they still maintained their plea of guilt. The Court having ascertained that they understood and appreciated the consequences and nature of their plea, recorded their plea of guilt and convicted them accordingly. The procedure, as stated by the Supreme Court in the case of *Lee Weng Tuck & Anor. v. PP* [1989] 1 CLJ (Rep) 75, was complied with.

The jury was then also accordingly discharged.

Plea of Mitigation

Counsel for each of the accused then made their plea in mitigation as stated below.

(a) **First accused**

Counsel pointed out that the first accused who was 28 years old, has a wife and six children between the ages of four to ten years. The Court was told that the first accused was a first offender with no previous conviction.

(b) **Second accused**

The second accused was said to be 24 years old at the date of the commission of the offence. Only three months before his arrest, he got married. The second accused who had no formal education, worked as a lorry driver supporting his aged parents. It was said that he came from a poor family background, living in a squatter area and had been influenced by bad company.

The Deputy Public Prosecutor pointed out that the second accused had previous convictions: In 1983, he was bound over in the sum of RM2,000 for a period of two years with one surety under s. 294 of the Criminal Procedure Code for the offence of armed robbery under s. 392/397 of the Penal Code. In 1986, he was fined RM1,000 or 14 months imprisonment for possession of ganja.

(c) **Third accused**

The third accused was 30 years at the date of the offence and was married with two children, aged five and six. He has not seen his children for the past four years since being in custody. His wife is a washer woman and the third accused at the time of his arrest had a steady job as a general labourer in a transport company. He had no previous conviction.

(d) **Fourth accused**

The fourth accused was 22 years at the time of his arrest. He was the fourth child of a family of nine children. Prior to his arrest, the accused worked as a contract grass cutter at the Dewan Bandaraya Kuala Lumpur, earning a monthly salary of RM350. He studied up to Form two and had to terminate his studies for financial reasons. His family was dependent on him for financial support.

(e) **Fifth accused**

The fifth accused was 19 years at the date of his arrest. He was then working as a petrol pump attendant at the Shell station opposite Puduraya. He was then living with his family. He lacked parental guidance and had been in bad company and had been lead astray. He too had no previous conviction.

(f) **Sixth accused**

The sixth accused came from a broken family. His father was an estate labourer and his mother left the family when the sixth accused was only 4 years old. This, together with his father's subsequent remarriage had a traumatic influence on him. He attended a Tamil school and was a drop-out. At the time of the commission of the offence he was 23 years old and worked as a contract labourer. He too was a first offender.

Counsel for all six accused urged the Court to take into consideration the important factor that all six accused had pleaded guilty. It was urged that in accordance with accepted sentencing practice, consideration should be given to this fact, especially the fact that a great deal of time and expense had been saved from an otherwise long trial. The full trial would have incurred much expense to the general public as 75 witnesses were involved.

All Counsel also pointed out that their clients were remorseful of their actions and promised not to be involved in the commission of any crimes in the future.

The accused had pleaded guilty of an offence which in accordance with the first limb of s. 304 carries the following punishment:

> Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, ...

It would be noticed that this section, like many others under the Penal Code gives the Court a wide discretion to determine the term of imprisonment which it may impose on an accused person for such an offence. However, wide as this discretion may appear to be, the Court must act judiciously in determining the sentence to be imposed. The Court must act in accordance with the relevant sentencing practice.

A leading writer on sentencing policies in criminal law has aptly stated the following reasons as to why the Courts are given such a wide discretion. Ashworth in *Judicial Independence and Sentencing Reform* in The Future of Sentencing [1982] Cambridge University Institute of Criminology, at p. 50 points out:

> The purpose of discretion is certainly to allow the sentencer to select the sentence which he believes to be the most appropriate in the individual case, considering both the facts of the case and any reports on the offender's character. The purpose of discretion is surely not to enable individual Judges and Magistrates to pursue purely personal sentencing preferences.

Sentencing Principles and Guidelines

The various theories and principles applicable in sentencing are now well documented. However, one important feature which has repeatedly been emphasised is the public interest aspect of sentencing principles. Hashim Yeop Sani J (as he then was) said in *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 257:

> One of the main consideration in the assessment of sentence is of course the question of public interest.

His Lordship quoted with approval the *dictum* of Hilbery J in *R. v. Kenneth John Ball* [1951] 35 Cr App R 164.

Abdoolcader J (as he then was) in *PP v. Teh Ah Cheng* [1976] 2 MLJ 186 at p. 187 observed:

> In sentencing generally the public interest must necessarily be one of the prime consideration ... public interest should never be relegated to the background and must of necessity assume the foremost importance.

Raja Azlan Shah Ag LP (as he then was) made the following observations in the Federal Court decision of *Jayatilake v. PP* [1982] 1 MLJ 83, on an appeal against sentence for the offence of giving false testimony in Court:

> He [the trial Judge] took the course he did, in outweighing the plea of mitigation in favour of the public interest with the desire to uphold the dignity and the authority of the law as administered in this country. We agree. That must receive the greatest weight. It is a serious offence to give false testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The Courts are the guardian of the public interest.

It should be emphasised that whilst public interest plays an important role in sentencing practice, there are other important factors which a Court needs to consider in imposing a particular sentence. Whilst it is recognised that no two cases may be the same, the exercise of the Court's discretion should be in accordance with certain accepted principles or guidelines so as not to have too great a disparity in sentences for the same offence.

Application of Sentencing Principles

Of particular importance to the case at hand are the consideration of the following guidelines or principles involved in sentencing:

(i) Discount or credit for the plea of guilty;

(ii) Comparison of sentences in other cases for a similar offence;

(iii) Disparity of sentence amongst the accused persons; and

(iv) Mitigating factors relevant to the present case.

(i) **Discount or credit for the plea of guilty**

It is an accepted rule of practice that an accused person should be given credit or discount for pleading guilty. The rationale for this rule is that much public time and money will be spared if an accused admits his guilt, thus avoiding a prolonged and unnecessary trial. This rule however, is not a strict rule as the Courts may, in exercise of their discretion, in exceptional cases, refuse to grant any discount: see for example PP. *v. Leo Say & 2 Ors.* [1985] CLJ (Rep) 683.

In *McLoughlin and Simpson* [1979] 1 Cr App R (S) 298, the English Court of Appeal in declining to reduce a 15-year sentence passed on two defendants with very bad criminal records who had forced their way into a woman's flat and raped her at knifepoint said:

> But this is an unusual case; and in the circumstances, although there was a plea of guilty, it seems to us that it would not be right to interfere in any way on that ground [of granting a discount] with the sentences which were passed.

In *R. v. de Haan* [1967] 3 All ER 618 (CA), at p. 619 Edmund Davies LJ said:

> It is undoubtedly right that a confession of guilt should tell in favour of an accused person, for that is clearly in the public interest.

The general rule that an accused person who pleads guilty is entitled to a discount was applied by our Supreme Court in *Mohamed Abdullah Ang Swee Kang v. PP*. The Supreme Court adopted with approval the views expressed by Cumming-Bruce LJ in *R. v. Boyd* [1980] 2 Cr App R (S) 234 where he said:

> The policy of the Courts is that where a man does plead guilty, which does give rise to public advantage and avoids the expense and nuisance of a trial, which may sometimes be a long one, the Court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty.

Similarly in the earlier Federal Court decision of *Sau Soo Kim v. PP* [1975] 2 MLJ 134 at p. 137, Lee Hun Hoe CJ (Borneo) said:

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses.

The Supreme Court in *Abdullah Ang's* case also held that a plea of guilty will entitle the accused person to a discount of between one-quarter to one-third of the sentence. Mohamad Azmi SCJ in delivering the judgment of the Supreme Court said at p. 215:

> It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence.

His Lordship also pointed out that failure on the part of a Judge in not granting credit or discounts may result in the Judge not exercising his discretion in sentencing judicially.

The credit or discount to be given in favour of the accused person is not on the maximum sentence imposed by law but rather on a sentence which would have been imposed on the accused if he had claimed trial and had been found guilty. Cumming-Bruce LJ in *R. v. Boyd*, above said:

> So one asks oneself, if there had been a plea of not guilty, and he had been convicted, what would have been the appropriate sentence?

Such a test was also adopted and applied by the Supreme Court in *Abdullah Ang's* case. See also Stockdale & Delvin, *Sentencing,* The Criminal Law Library, No. 5, 1987, para. 2.23 and also *11 Halsbury's Law of England,* 4th Edn., para. 483.

Therefore, in applying the above principles of sentencing, the accused in the present case would be entitled to a discount or credit from a sentence which they would have obtained had they not pleaded guilty and had been convicted.

It is therefore necessary for me to consider now what sentence would have been an appropriate sentence had they pleaded not guilty and had been convicted.

(ii) **Comparison of sentences in other cases for a similar offence**

There is a dearth of reported cases on this point. However, in *Tham Kai Yan & Ors. v. PP* [1977] 1 MLJ 174, Raja Azlan Shah FJ (as he then was) in delivering the judgment of the Federal Court imposed a 10 year imprisonment on each of the appellants for a similar offence. His Lordship said:

> We set aside the convictions for murder, and substitute them with one under the first part of s. 304, Penal Code read with s. 34, Penal Code and sentenced each of the appellant to 10 years imprisonment effective from their dates of arrest.

It should, however, be noted that in that case, the accused had pleaded **not** guilty to a charge of murder under s. 302, read with s. 34 of the Penal Code.

Except for *PP v. Leo Say & 2 Ors.* [1985] CLJ (Rep) 683, no other Malaysian case was drawn to the Court's attention where an accused had pleaded guilty on a charge of culpable homicide under the first limb of s. 304. *Leo Say's* case however, is not very helpful to the present case as the Court in that case appears to have based its decision on the main ground that firearms were used in the commission of the offence. Therefore, the recent Singapore decision in *PP v. Chot Saik Kam* [1991] 1 MLJ 193 is of some relevance. In this case, the High Court imposed a 10 year (maximum being life imprisonment) sentence for a similar offence to that which the six accused in the present case had pleaded guilty. In that case too, the accused pleaded guilty to a charge of culpable homicide (s. 304(a) of the Singapore Penal Code). In *PP v. Tay Chuan Beng* [1989] 1 MLJ 403, the High Court of Singapore in another case on culpable homicide imposed a 8 year imprisonment for an offence under s. 304 of the Singapore Penal Code. In that case too, both the accused pleaded guilty.

It therefore appears, that the practice in Malaysia and Singapore, as a general rule, is to impose a 8 to 10 years term of imprisonment for a similar offence: the Federal Court in *Tham Kai Yan* imposing a 10 year imprisonment where the accused had pleaded not guilty to a charge of murder and subsequently found guilty under the first limb of s. 304; the Singapore High Court imposing a 8 year term of imprisonment in *Tay Chuan Beng* and a 10 year imprisonment in *Chot Saik Kam.*

(iii) **Disparity of sentences amongst accused persons**

If two or more persons had either pleaded guilty or had been found guilty for the same offence committed jointly, the general rule is that any unjust disparity should be avoided. However, there is nothing to prevent the Court from imposing a range of sentences on the accused persons if there are important considerations for so doing. The ages of the accused, the degrees of culpability and the differences in mitigation are amongst some of the important factors which warrant a disparity in sentences.

In the present case, in the absence of clear evidence to indicate the involvement of each of the accused in the commission of the offence, the degree of culpability is difficult to ascertain.

All the accused persons are relatively young. Except for the second accused, the others are all first offenders. The plea in mitigation of all the accused appears to favour a uniform sentence. In *Tham Kai Yan's* case, both the accused were granted similar sentences.

Conclusion

In applying the above principles, I come to the following conclusions:

(a) That the accused persons should be given a discount of one-quarter of the sentence which would be imposed on them had they pleaded not guilty and had been found guilty after the trial. Considering the serious nature of the offence, and also the fact that eight of them, the six accused and two others still at large committed this offence against a single man who was probably completely helpless, a discount of one-quarter, rather than one-third would be appropriate.

(b) In granting the one-quarter discount, I have taken into account two major factors:

(i) that a long and protracted trial would have taken place had the accused pleaded not guilty. There are some 75 witnesses involved. The jury, the Court and the police and the prosecution would have all been involved in the case for a considerable length of time. Their plea of guilt has certainly been in the public interest; and

(ii) their plea has also assisted the prosecution: the two others involved in the commission of the offence are still at large and have not been apprehended. There is a possibility that though all the six accused had been charged with a common intention to commit the offence, the non-availability of the two may affect the culpability of all or some of them.

(c) I accept that the appropriate sentence if the accused had been found guilty after a trial would have been within the range of 8-10 years.

(d) In the absence of evidence before me, it is difficult to ascertain the degree of culpability of each of the accused involved in the commission of this offence. But bearing in mind that they have all been charged with a common intention, subject to what I have to say subsequently, I hold that there should be no disparity in the sentences.

(e) All the six accused are young: their ages only range from 19 to 30 years. Except for the second accused, the rest are first offenders. The first and third accused, are also married with children. A long prison sentence would therefore certainly affect their families and also their own prospect of fitting into society again.

(f) Considering this and all other factors, and giving them credit for their plea of guilt, I sentence the first, third, fourth, fifth and sixth accused to a term of imprisonment for 8 years to run from their date of arrest. As for the second accused, taking into consideration that he has committed other offences before, one in 1983 and the other in 1986, I sentence him to a term of imprisonment for 8 years and 6 months to run from the date of his arrest.

Postscript

Sentencing is guided by established principles and guidelines. The Courts generally exercise their discretion in accordance with these principles and guidelines. Though the importance of sentencing principles were often neglected before, it has now gained much attention. Defence lawyers need to be familiar with the relevant decisions on sentencing so as to assist the Court in imposing an appropriate sentence. In this regard, a plea in mitigation, cannot be merely a statement of the accused antecedent and family background. It must, like a

submission be interspersed with relevant authorities. The following two comments on the role of advocates in presenting a plea in mitigation, may be of relevance. The following observation was made by Judge Frankel in *Criminal Sentences: Law Without Order* [1973]:

> The usual defence lawyer's statement pleads for compassion, stressing the defendant's virtues, if any; family ties; the good opinions of employers, teachers and the like. Such things are relevant to be sure. They appear, however, neither to be novel nor wholly accurate ...

He added that a good lawyer for the defence would be one who:

> had made the sentencing problem a subject of genuine study; has managed effectively to size up the Judge and his concerns; and succeeds in proposing an appropriate, imaginative, and sensible sentence that appears genuinely to serve both the client's and the public interests.

The other relevant comment is made by the well known writer, Stockdale in *The Court and the Offender* (1967) at p. 202:

> The mitigation speech must be recognised as being one of the most important functions of the advocate, and should not be regarded as something which prevents the Court from getting on with its 'real' work, namely the trial of pleas of not guilty. The advocate should equip himself properly for his double task of representing his client, and of helping the Court to come to the conclusion ...

Also found at [1992] 4 CLJ 2043